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CHARLES ELMORE CRO

No. ~~212~~ 42

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

INTERNATIONAL SHOE COMPANY, Petitioner,

vs.

FEDERAL TRADE COMMISSION.

PETITION FOR REHEARING.

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No. 718.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

INTERNATIONAL SHOE COMPANY, Petitioner,

vs.

FEDERAL TRADE COMMISSION.

PETITION FOR REHEARING.

Comes now the above-named petitioner, International Shoe Company, and presents this, its petition for rehearing in the above-entitled cause, and in support thereof shows:

The application for a writ of certiorari, filed February 25, 1929, was denied April 15, 1929.

As reasons why a rehearing in this cause should be granted, petitioner begs leave to state the essential grounds of its contention:

First. Section 7 of the Clayton Act has no application to the purchase of shares in a failing corporation, and

insolvency under the definition of the Bankruptcy Act is not the test.

Second. There was no substantial competition between the two corporations and there was no prospect of future competition. The evidence is undisputed and gives no support to the conclusion of the Court of Appeals to the contrary.

I.

The one main question of law in this case has not been decided by this Court in this case or any other case, and yet it is a question frequently faced by the business interests of this country, and is now, and will continue to be, of the utmost importance to them.

The question is this: Is there a violation of Section 7 of the Clayton Law where one corporation buys the share capital of another corporation engaged in the same line of commerce, when the latter corporation is insolvent within the laws of the state governing its existence, or for any other reason is incapable of continuing its business, but has not been declared bankrupt under the Federal Bankruptcy Act? In short, the question as it concerns business is this: Can a corporation thus involved sell its business as a going and organized concern, thereby salvaging more for its creditors and stockholders than could possibly be realized by a forced liquidation or a sale of its assets?

In its findings the Commission did not pass on this question, but based its decision on the fact that the McEl-

wain Company was not bankrupt under the Federal Bankruptcy Act, and in its brief before this Court this question of law is not discussed. It is not clear whether the Circuit Court of Appeals decided the question, and this Court, in its denial of the application for a writ of certiorari, has not decided it.

Similar questions under the Sherman Law have been decided by this Court and by the courts of appeal in several circuits, and in each instance the distressed condition of the failing concern has been held to be a circumstance that justified the acquisition. Therefore, does this circumstance of insolvency (as distinguished from federal bankruptcy) remove such acquisitions from the ban of the Clayton Law as it removed them from the ban of the Sherman Law?

II.

The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of Federal Trade Commission v. Thatcher Manufacturing Company, which Court, in 5 Federal (2nd), at page 622, paragraphs 6, 7, said and held:

> "Not every acquisition by one corporation of the stock of a competing corporation is forbidden by Section 7 of the Clayton Act. The act, by express terms, says that section 7 does not apply to a corporation 'purchasing such stock * * * and not using the same

to bring about, or in attempting to bring about, the substantial lessening of competition.' Testing the transaction (as it affected the Woodbury Company) by the whole of section 7, the evidence discloses that before the respondent acquired the stock of the Woodbury Company that corporation was engaged chiefly in the manufacture of condiment and whisky bottles, and that its manufacture of milk bottles was very small, amounting annually to about 8,000 gross out of a total production in the United States of over 1,000,000 gross. The evidence also shows that it was gradually getting out of the milk-bottle business and that, indeed, before the transaction in question arose it had determined to do so. When its stock was acquired the respondent took over its outstanding contracts, one or two in number, and filled them. The respondent's real object in acquiring the Woodbury stock, as we see it, was to acquire its patent license, that being a nonexclusive license to use the Hartford-Fairmont feeders in the manufacture of condiment bottles, fruit juice bottles, fruit containers, fruit jars and glassware for carbonated soft drinks, branches of the glassware business in which the respondent was not engaged, and, therefore, in which it was not a competitor. While the effect of the transaction upon the Woodbury Company was to stop its manufacture of milk bottles and, accordingly, to end its competition in milk-bottle manufacture, the number of milk bottles the Woodbury Company made was so inconsiderable that the lessening of competition thereby was not substantial. We are, therefore, of opinion that the evidence does not sustain the Commission's finding that the respondent's acquisition of the stock of the Woodbury Glass Company substantially lessened com-

petition between the corporations, restrained commerce and tended to create a monopoly. That part of the Commission's order is, therefore, not approved and will not be enforced." (Approved by this Court in Thatcher Mfg. Co. v. Federal Trade Commission, 272 U. S., l. c. 560.)

The undisputed facts in the instant case show that at the time of the acquisition there was no substantial competition between the two corporations; that the McElwain Company was only producing about six or seven thousand pairs of shoes per day; was not operating in excess of twenty-eight per cent of capacity, and since the previous October its operations had varied from ten to thirty per cent of capacity; that it had defaulted in the payment of dividends on its second preferred stock; that its maturing obligations could not be met and some of its banks had determined to ask for the payment of their loans; that upon publication of the balance sheet of the company, required under the laws of Massachusetts, the corporation would have been actually insolvent and faced with the alternative of sale of its assets or liquidation (so that it was practically out of the shoe business); that the International Shoe Company had orders largely in excess of the capacity of its factories; that the purchase of the shares of stock, rather than the purchase of assets, was made by the International Shoe Company solely for the purpose of acquiring additional factories, with management and operatives, to quickly manufacture shoes to fill its then orders and sup-

plement its own factories in the production of shoes for future orders.

This Court has heretofore held that, in a proceeding of this nature, the respondent shall not be condemned upon mere inferences; and in this case the findings as to substantial competition between the two companies, as to the solvency of the McElwain Company, and as to the reasons for acquisition in the form of a stock purchase, are pure inferences which are contradicted by the undisputed testimony of all the witnesses.

> "Manifestly, the Court must inquire whether the Commission's findings of fact are supported by evidence."
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> **Fed. Trade Com. v. Curtis Pub. Co.**, 260 U. S., at page 580.

The second question presented is: Where the ability to compete has been eliminated by the insolvent condition of the seller, which is forced to retire from business, is a purchase of the share capital made to obtain a going concern with facilities to supplement those of the purchaser a violation of section 7?

This question is of great importance. The decision of the Court of Appeals, made final by the refusal of this Court to review it, is in conflict with the decision of this Court in the Thatcher case quoted.

For the foregoing reasons, petitioner respectfully urges that this petition for rehearing be granted, and that the

judgment of this Court denying the application of petitioner for certiorari be, upon further consideration, set aside, and that the petition for certiorari be granted.

Respectfully submitted,

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J. D. WILLIAMSON,
CHARLES NAGEL,
Attorneys for Petitioner.

I, Charles Nagel, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

Charles Nagel,
Counsel for Petitioner.